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IN THE
COURT OF APPEALS OF INDIANA

WILLIAM H. KLINGER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 79A02-0608-PC-651
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-9608-CF-47

April 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

William H. Klinger appeals the denial of his petition for post-conviction relief. We affirm.

Issue

We restate Klinger's issue as whether the post-conviction court's denial of his petition was clearly erroneous.

Facts and Procedural History

Klinger was a homeless man who lived for several years in his 1977 Lincoln Continental on the streets of Lafayette. On August 5, 1996, Klinger accidentally backed his Lincoln into another car at a Lafayette gas station. When the police were called, Klinger fled the scene because he had no automobile insurance. Later that night, Klinger returned to the gas station to use the restroom. An employee recognized him and called the police. When Klinger exited the restroom and saw a police car, he drove away and led police on a low-speed chase. Klinger swerved his car toward oncoming police vehicles during the chase. The officer in charge decided to call off the chase as it was becoming too dangerous. Because Klinger was well known by the Lafayette police, the officer in charge thought that police could easily apprehend Klinger at a later time.

Civilians Marcus Spalding and Kelly Williams had watched the police chase unfold as Spalding drove his truck nearby with Williams as his passenger. Spalding and Williams began pursuing Klinger after police stopped chasing him because the couple assumed that police had lost sight of him. They chased Klinger through several business parking lots before rear-ending his car in a restaurant parking lot. Klinger exited his vehicle and fired

several shots at Spalding and Williams with a long-barreled, .22-caliber revolver. Spalding and Williams sped away at approximately the same time that Lafayette police officer Jeff Clark arrived on the scene, responding to a report of shots being fired. As Officer Clark stepped out of his police cruiser, Klinger charged at him and shot him once in the chest. Officer Clark was wearing a Kevlar vest, which protected him from severe injury. Klinger chased Officer Clark around his police cruiser, and the two men exchanged gunfire. Lafayette police officer Michael Roberts arrived on the scene and shot Klinger in the right arm and both legs. Police were then able to apprehend him.

The State charged Klinger with three counts of attempted murder, class A felonies, four counts of pointing a firearm as class D felonies, two counts criminal recklessness as class A misdemeanors, and one count of leaving the scene of an accident as a class B misdemeanor. A jury found Klinger guilty on one count of pointing a firearm, two counts of criminal recklessness, and one count of leaving the scene of an accident. The jury acquitted Klinger on the remaining charges, except for the charge of attempted murder with regard to Officer Clark, upon which they were unable to reach a verdict. Klinger was subsequently retried and convicted on the attempted murder charge.

At the sentencing hearing on September 10, 1999, the trial court reviewed Klinger's presentence investigation report ("PSI report") and his supplemental sentencing report, which contained psychological evaluations of Klinger by Jeff Vanderwater-Piercy, Ph.D., and Stephen C. Cook, M.D. The PSI report notes that Klinger, then fifty years old, had "no known prior criminal history." Appellant's App. at 93. According to Dr. Vanderwater-Piercy's April 5, 1999, report, his evaluation suggested that Klinger is a "chronically

depressed individual with prominent paranoid personality features and narcissistic traits." *Id*. at 106. He also concluded that on the night of the shooting, Klinger experienced "a brief reactive psychosis characterized by … the delusional belief that police intended to kill him." *Id*. Dr. Cook's report indicates that Klinger has "paranoid personality disorder with narcissistic traits" and is unable to deal with stress. *Id*. at 120. Dr. Cook concluded that prior to shooting Officer Clark, Klinger experienced "a downward spiral of logical thinking and an escalating spiral of persecutory and paranoid thinking[.]" *Id*. at 121. Both experts concluded that their findings supported Klinger's claim that he shot at Officer Clark out of fear for his own life. *Id*. at 106, 121.

At the sentencing hearing, defense counsel Steven P. Meyer argued that Klinger's lack of criminal history and his mental state at the time he shot Officer Clark were strong mitigating factors. The trial court found no mitigating factors, however, and two aggravating factors—that Klinger was in need of correctional and rehabilitative treatment best provided in a penal facility and that the victim recommended an enhanced sentence. The court sentenced Klinger to the maximum term of fifty years.[1] Klinger's counsel on direct appeal, Michael Troemel, argued that Klinger's conviction for attempted murder should be vacated because he had already been convicted in his first trial of the lesser-included charge of pointing a firearm. Another panel of this Court rejected this double jeopardy argument and

[1] At the time of Klinger's sentencing, Indiana Code Section 35-50-2-4 stated in relevant part: "A person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances . . . ."

affirmed his attempted murder conviction. *Klinger v. State*, No. 79A02-9912-CR-873 (Ind. Ct. App. Sept. 29, 2000), *trans. denied*.

On January 22, 2001, Klinger filed a petition for post-conviction relief. On August 16, 2006, Klinger filed an amendment to his petition, alleging ineffective assistance of appellate counsel. At the hearing on Klinger's petition, Troemel testified that prior to filing Klinger's appeal, Troemel had reviewed the PSI report and the supplemental sentencing report. When asked if he had "any strategic reason" for not appealing Klinger's sentence for attempted murder, Troemel responded:

> I don't, I don't recall that it was a matter of strategy or maybe if I thought the sentence was appropriate or – I just don't know. I know we focused, that Richardson case had come out on double jeopardy[2] and I know that this case got reversed once and it was re-tried. And there was a lot, a lot of double jeopardy. I can't tell you why I didn't raise any sentencing issue.

Tr. at 9.

On July 7, 2006, the post-conviction court denied Klinger's petition for relief. Klinger now appeals.

Discussion and Decision

To succeed on appeal from the denial of post-conviction relief, the petitioner must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite to the one reached by the post-conviction court. *Johnson v. State*, 832 N.E.2d 985, 991 (Ind. Ct. App. 2005), *trans. denied*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Id*. The post-conviction court in this case entered findings of fact and conclusions of law in accordance

with Indiana Post-Conviction Rule 1(6). We will reverse a post-conviction court's findings and judgment only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made. *Id*. at 992. In this review, findings of fact are accepted unless clearly erroneous, but no deference is accorded conclusions of law. *Id*.

Before the post-conviction court, Klinger argued that his appellate counsel was ineffective by failing to raise issues regarding his sentence.

> We analyze claims of both ineffective assistance of trial counsel and ineffective assistance of appellate counsel according to the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). First, we require the petitioner to show that, in light of all the circumstances, the identified acts or omissions of counsel were outside the wide range of professionally competent assistance. This showing is made by demonstrating that counsel's performance was unreasonable under prevailing professional norms. Second, we require the petitioner to show adverse prejudice as a result of the deficient performance, that is, that but for counsel's deficient performance, the result of the proceedings would have been different. We will find prejudice when the conviction or sentence has resulted from a breakdown of the adversarial process that rendered the result unjust or unreliable. It is not necessary to determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.

Sada v. State, 706 N.E.2d 192, 198 (Ind. Ct. App. 1999) (some citations omitted). The decision regarding what issues to raise is one of the most important strategic decisions to be made by appellate counsel. *Conner v. State*, 711 N.E.2d 1238, 1252 (Ind. 1999), *cert. denied*. Accordingly, when assessing these types of ineffectiveness claims, reviewing courts should be particularly deferential to counsel's strategic decision to exclude certain issues in favor of others, unless such a decision was unquestionably unreasonable. *Bieghler v. State*,

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[2] *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999).

690 N.E.2d 188, 194 (Ind. 1997), *cert. denied* (1998) (citing *Smith v. Murray*, 477 U.S. 527, 535-36 (1986)).

At the time of Klinger's appeal, reviewing courts considered several factors when a trial court was alleged to have abused its discretion in ordering an enhanced sentence. "The trial court's statement must identify all significant mitigating and aggravating circumstances, include a specific reason why each circumstance is mitigating or aggravating, and weigh mitigating circumstances against the aggravating factors." *Sims v. State*, 585 N.E.2d 271, 272 (Ind. 1992). "As long as the record indicates that the trial court engaged in the evaluative processes and the sentence was not manifestly unreasonable, the purposes of the sentencing statement have been satisfied." *Singer v. State*, 674 N.E.2d 11, 14 (Ind. Ct. App. 1996). A single valid aggravator was sufficient to sustain an enhanced sentence. *Kingery v. State*, 659 N.E.2d 490, 496 (Ind. 1995).

We address each of Klinger's claims in turn.

Klinger claims that his appellate counsel should have challenged the trial court's failure to consider as mitigating factors his lack of criminal history and his mental illness. It is generally within the trial court's discretion to determine what constitutes a significant mitigator. *Jones v. State*, 698 N.E.2d 289, 291 (Ind. 1998). Further, the trial court is under no obligation to explain its decision not to find a mitigating factor or to assign any particular weight to the defendant's asserted mitigating factors. *Carter v. State*, 560 N.E.2d 687, 690 (Ind. Ct. App. 1990), *trans. denied*. However, a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them. *Widener v. State*, 659 N.E.2d 529, 533 (Ind. 1995).

At sentencing, Klinger's counsel argued that Klinger had no prior arrests or convictions. The State countered that Klinger did have "a history of confrontational, abusive, and threatening behavior[.]" Appellant's App. at 146-47. In the State's submissions for sentencing consideration, it presented evidence of several incidents in which Klinger allegedly exhibited such behavior. *See* R. at 2059-2160. For example, in 1994, a permanent protective order was issued prohibiting him from contacting or visiting the Lafayette healthcare facility where his father resided, its director, and any of its employees. The director had filed a petition, alleging that Klinger was abusive and threatening to the staff. She also described an incident wherein Klinger pointed his finger at her as if it were a gun and threatened to kill her. His temporary agency employment records indicate that in late 1995 and early 1996, he was involved in two physical altercations at job sites, including one in which he pulled a knife on someone. Later in 1996, Klinger stopped his car on a set of railroad tracks in Lafayette as the traffic ahead of him was stopped at a red light. He honked and yelled at the woman in front of him to move her car, but she had nowhere to move because there was a car stopped directly in front of her as well. Although there was no sign of an oncoming train, Klinger repeatedly rear-ended the woman's van, which also held her four young children, until the stoplight turned green.

As noted above, the trial court was under no obligation to explain why it chose not to consider Klinger's lack of criminal history as a mitigator. We tend to agree with the post-conviction court's findings on the issue:

> Regarding the mitigating circumstances, it is not true to say that there was a "complete lack" of criminal history. It is only correct to say that the petitioner did not have criminal convictions. In the context of the extreme

> violence of this case, that does not amount to a factor deserving of mention or weight. The State filed a sentencing submission detailing threatening and disturbing encounters that the petitioner had with others including the brandishing of a weapon. That submission addressed criminal history, dangerousness, anti-social character and the petitioner's lack of respect for others' rights and safety.

Appellant's App. at 58. The post-conviction court concluded that appellate counsel's decision not to raise this issue was not deficient and that the results of Klinger's appeal would not have been different if the issue had been argued. *Id*. at 61. We find no clear error in the post-conviction court's determination.

Klinger also raises the issue of his mental state at the time of the shooting. At the sentencing hearing, Klinger's trial counsel argued that the trial court should assign significant mitigating weight to Klinger's "personality disorder[.]" *See id*. at 134-36. Prior to sentencing, Klinger provided the trial court with two psychological evaluation reports. Both of the evaluators—a clinical psychologist and a psychiatrist—concluded that their findings regarding Klinger's mental state supported the plausibility of his claims that he shot at Officer Clark out of fear for his life. *See id*. at 106, 121. Both experts reported that Klinger suffers from a paranoid personality disorder and that he experienced a brief psychotic reaction at the time of the shooting. *See id*. at 106, 120-21.

The trial court assigned no mitigating weight to Klinger's alleged personality disorder. Prior to Klinger's sentencing, our supreme court held that mental illness was a proper mitigator, particularly where there was a relationship between the mental illness and the crime. *See, e.g. Mayberry v. State*, 670 N.E.2d 1262, 1271 (Ind. 1996) (holding that where two of four evaluating psychiatrists testified that defendant was mentally ill at the time she

committed the crime, and jury returned verdict of guilty but mentally ill, trial court abused its discretion by failing to weigh mental illness as a significant mitigator); *see also Barany v. State*, 658 N.E.2d 60, 67 (Ind. 1995) (holding that where "voices" in defendant's head told him to kill victim, mental illness caused him to commit the murder and therefore the court must mitigate his sentence).

In the instant case, there was evidence before the trial court that supported the mitigating factor of mental illness. It appears that there was conflicting evidence as well, namely, Klinger's responses to the court's questions at the sentencing hearing. He spoke to the court (seemingly calmly and coherently) about his belief that police officers encourage crime in order to make a living and that he shot Officer Clark because he assumed that Officer Clark would shoot him. The trial court stated, "The Court does believe that you are a danger to the community. You have no remorse, you're angry, I think you're non-caring about other people, and you are a danger." Appellant's App. at 158. Because of Klinger's callous attitude and lack of remorse even three years after the shooting and because of the trial court's discretion in finding mitigators, a direct appeal of the trial court's decision not to find mental illness as a mitigator likely would have failed. *See Ross v. State*, 676 N.E.2d 339, 347 (Ind. 1996) (holding that "the proper weight to be afforded by the trial court to the mitigating factors may be to give them no weight at all."). Again, we agree with the post-conviction court that Klinger failed to show that appellate counsel's decision not to appeal this issue amounted to deficient performance.

Klinger also argues that the trial court considered two improper aggravators—the victim's recommendation for an enhanced sentence and Klinger's need for correctional and

rehabilitative treatment—in making its sentencing determination. The State concedes that the sentencing recommendation of the victim or his family is not typically viewed as a valid aggravator. Appellee's Br. at 14 (citing *Bacher v. State*, 686 N.E.2d 791, 801 (Ind. 1997), *appeal after remand*, 722 N.E.2d 799 (Ind. 2000), and *Edgecomb v. State*, 673 N.E.2d 1185, 1199 (Ind. 1996)); *but see Brown v. State*, 667 N.E.2d 1115, 1116-17 (Ind. 1996) (acknowledging victim's family's recommendation for a "harsh" sentence as a valid aggravator). At the time Klinger was sentenced, our supreme court had held on more than one occasion that victims' sentencing recommendations are not mitigating or aggravating factors but that they may nonetheless properly assist a court in "determining what sentence to impose for a crime[,]" as set forth in the sentencing statute—Indiana Code Section 35-38-1-7.1—as it existed at that time. *See e.g. Brown v. State*, 698 N.E.2d 779, 782 (Ind. 1998); *Edgecomb*, 673 N.E.2d at 1199. The 1999 version of Indiana Code Section 35-38-1-7.1(a) listed several issues to be considered by the trial court "in determining what sentence to impose for a crime," such as the risk that the convicted person will re-offend, the age of the victim, and "any oral or written statement made by a victim of the crime." Subsections (b) and (c) of the statute list factors that the court "may consider" as aggravators and mitigators.

In the instant case, the trial court improperly cited Officer Clark's recommendation as an aggravating factor, but under the sentencing statute in effect at the time, it was permitted under subsection (a) of the applicable sentencing statute to consider Officer Clark's statement in reaching a sentencing determination. Therefore, any error was harmless.

Here, the trial court also identified as an aggravator Klinger's need for correctional or rehabilitative treatment that can best be provided by his commitment to a penal facility.

Appellant's App. at 156, 160. This aggravator is proper only when the trial court articulates why the specific defendant requires treatment for a period of time in excess of the presumptive sentence. *Beason v. State*, 690 N.E.2d 277, 281-82 (Ind. 1998). Here, the trial court supported this aggravator with its conclusions that Klinger is a danger to the community, has no remorse, and does not care about other people. *Id*. Klinger argues that his appellate counsel was ineffective in failing to challenge this aggravator because the trial court's observations "logically do not justify" an enhanced sentence and because his apparent lack of remorse was appropriate in light of the fact that he maintained a "legal justification" for shooting Officer Clark. Appellant's Br. at 12. Again, we find no clear error in the post-conviction court's rejection of Klinger's ineffective assistance of counsel claim on this issue.

We note that at the time of Klinger's direct appeal, Indiana Appellate Rule 17(B) provided that this Court "will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender." This review is very deferential to the trial court. *Bunch v. State*, 697 N.E.2d 1255, 1258 (Ind. 1998). "[T]he issue is not whether in our judgment the sentence is unreasonable, but whether it is clearly, plainly, and obviously so." *Id*. (citation omitted).

To successfully appeal the trial court's enhanced sentence as manifestly unreasonable, Klinger would have had to demonstrate that his fifty-year sentence was "clearly, plainly, and obviously" unreasonable in light of the nature of the offense and his character. *Id*. First, we note that Klinger led police on a dangerous car chase, swerved at oncoming police cars, and eventually shot an officer in the chest when confronted. He showed no remorse for his actions; in fact, at sentencing, he admitted his belief that police officers "threaten honest

people constantly" and that they "try to invoke and provoke" crime. Appellant's App. at 156, 157. Klinger also stated that he shot Officer Clark because he "assumed that he was gonna do the same to me." *Id*. at 158. With these facts and with the difficult standard under Rule 17(B), an argument on direct appeal for revision of Klinger's sentence would almost certainly have failed; at the very least, counsel was not deficient for failing to raise it. The post-conviction court's denial of relief on this issue was not clearly erroneous.

In sum, Klinger has failed to demonstrate that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. Therefore, we must affirm.

Affirmed.

SHARPNACK, J., concurs.

SULLIVAN, J., dissents with opinion.

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WILLIAM H. KLINGER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 79A02-0608-PC-651
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

SULLIVAN, Judge, dissenting

I am of the view that the post-conviction court erroneously ignored Klinger's mental condition at the time of the shooting involving Officer Clark. It was this incident which was the basis for Klinger's conviction for attempted murder and for the maximum fifty-year sentence imposed.

Both experts opined in their evaluations that Klinger, at the time in question, did in fact believe that Officer Clark was going to kill him and he shot out of fear for his own life. I believe that this state of the evidence constitutes a substantial and significant mitigator, which should have been raised by counsel in Klinger's direct appeal.

Recognizing that the sentencing court, if acknowledging the mental condition as a mitigator, would balance that against the aggravators, and further acknowledging that such balancing process could reasonably result in the factors being in equipoise, I would reverse and direct the post-conviction court to grant relief by reducing the maximum fifty-year sentence to the presumptive thirty-year sentence.